(6)

No. 87-5259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, Director, Illinois Department of Corrections, et al.

Respondents,

On Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

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BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Whether a prosecutor's use of peremptory challenges to exclude members of a distinctive group from the petit jury violates the Sixth Amendment fair cross-section requirement.

Whether, consistent with Justice Harlan's view of retroactivity, *Batson* v. *Kentucky* should at a minimum be applied retroactively to all convictions not final when certiorari was denied in *McCray* v. *New York*.

Whether *Swain* v. *Alabama* permits the prosecution's volunteered reasons for its exercise of its peremptory challenges to be examined to determine if it has engaged in racial discrimination.

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

STATUTES Page

MISCELLANEOUS

OPINIONS BELOW

The en banc opinion of the court of appeals (J.A. 14) is reported at 820 F.2d 832 (7th Cir. 1987). The order vacating the proposed panel opinion and ordering rehearing en banc pursuant to circuit rule 16(e) (J.A. 7) is reported at 779 F.2d 1332 (7th Cir. 1985). The district court opinion denying habeas corpus relief (J.A. 5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1987. The petition for writ of certiorari was filed on August 10, 1987 and was granted on March 7, 1988. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Frank Teague, a black man, was convicted of armed robbery of an A&P supermarket and attempt murder of police officers who were shot at following the robbery. His defense was insanity. *People* v. *Teague*, 108 Ill.App.3d 891, 439 N.E.2d 1066 (1st Dist. 1982) (Campbell, J., dissenting). The jurors selected and sworn to decide the issue of guilt or innocence were white, the prosecution having elected to exercise all ten of the peremptory challenges afforded it by statute, Ill.Rev.Stat., Ch. 38, § 115-4(e), to excuse prospective jurors who were black.

Those excluded jurors included nine women and one man of varying backgrounds and ages. Defense counsel excused a black juror who was married to a police officer. (J.A. 3)

The defense made two motions for mistrial complaining of the prosecutor's exclusion of the black jurors, one after six black jurors had been peremptorily challenged by the State (J.A. 2), and the second at the conclusion of jury

selection. In response to the second motion, the prosecutor represented that he was attempting to achieve a balance of men and women and age groups. He noted defense counsel had used one of his challenges against a black juror and that the prosecution had excused a white juror during selection of the alternates. The trial judge made no finding as to the validity of the State's proffered explanation and merely denied the defense motion. (J.A. 3, 4)

The Illinois Appellate Court declined to grant Teague relief from his conviction because he had failed to demonstrate systematic exclusion of black jurors as was his burden according to *Swain* v. *Alabama*, 380 U.S. 202 (1965). The court refused to recognize any other claimed basis for relief. With respect to the prosecutor's representation that he had exercised his challenges to achieve a balance of men, women and age groups, the court observed "an examination of the record shows that white jurors who fell within the men, women and age groups to which the State referred were not excused peremptorily by the State." *Teague*, 439 N.E.2d at 1069, 1070. Rehearing was denied by the appellate court, the Illinois Supreme Court denied leave to appeal, *People* v. *Teague*, 449 N.E.2d 810 (Ill. 1983) (Simon, J., dissenting) and this Court denied a petition for writ of certiorari. *Teague* v. *Illinois*, 464 U.S. 867 (1983) (Marshall and Brennan, JJ., dissenting).

On March 5, 1984, Teague filed a petition for writ of habeas corpus in the federal district court, complaining his Sixth and Fourteenth Amendment rights were violated by the prosecution's exclusion of black jurors by peremptory challenge. (Petition, p. 4) On August 8, 1984 the district court denied relief and granted Respondents' motion for summary judgment, concluding Teague's claim

was foreclosed by *Swain* and decisions of the court of appeals declining to depart from *Swain*. The court found, however, that Teague's arguments were persuasive. (J.A. 5, 6)

A divided panel of the court of appeals agreed with Teague that the Sixth Amendment does bar use of the peremptory challenge to deprive an accused of the fair possibility of obtaining a representative jury, but its opinion was vacated and the cause set for rehearing en banc pursuant to circuit rule 16(e). *U.S. ex rel. Teague* v. *Lane*, 779 F.2d 1332 (7th Cir. 1985) (Cudahy, J., dissenting). (J.A. 7) After reargument en banc, the court determined that the Sixth Amendment fair cross-section requirement had no application to the petit jury, that the intervening decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986) had no retroactive application because Teague's conviction was final, and that, assuming it was not procedurally barred, no *Swain* equal protection violation had been demonstrated. *Teague* v. *Lane*, 820 F.2d 832 (7th Cir. 1987) (Cudahy and Cummings, JJ., dissenting). (J.A. 14) On March 7, 1988, this Court granted Teague's petition for writ of certiorari in which all three issues are presented to the Court. (J.A. 54)

SUMMARY OF ARGUMENT

1. *Batson* v. *Kentucky*, 476 U.S. 79 (1986) recognized that a jury cannot perform its function of safeguarding the accused against the arbitrary exercise of power by a prosecutor or judge if citizens are excluded from jury service by the prosecutor's exercise of the peremptory challenge on account of race. This same injury occurs whenever any distinctive group in the community is denied an opportunity to serve on the petit jury, but the *Batson* remedy is limited to those cases where the accused is a member of

the excluded group. No less protection from the exercise of arbitrary power should be afforded to an accused who is not a member of a group excluded from the jury.

Elimination of abuse of the peremptory challenge can be achieved by recognizing that the Sixth Amendment guarantees the accused a jury selected in accordance with procedures that allow a fair possibility for the jury to reflect a cross section of the community. The defendant is not entitled to a jury of any particular composition and no requirement exists that the petit jury mirror the distinctive groups in the population, *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), but the right of the defendant to have his jury drawn from a source fairly representative of the community contemplates the possibility that the petit jury will be similarly representative. Inclusion of distinctive groups in the jury pool has importance because it provides the opportunity for members of those groups to function as petit jurors. Permitting a prosecutor to use the peremptory challenge as a tool to cull distinctive groups from the petit jury would be inconsistent with our democratic heritage, undermine public confidence in the fairness of the criminal justice system by creating the appearance of unfairness, and deny the accused the benefit of the common-sense judgment of the community by impairing the representative character of the jury.

The standards of *Duren* v. *Missouri*, 439 U.S. 357 (1979) can be employed to determine whether the selection of the petit jury comports with the Sixth Amendment. To establish a prima facie case of a violation of the fair cross-section requirement defendant would show 1) the group allegedly excluded is a distinctive group in the community; 2) representation of this group in the community is not fair and reasonable in relation to the number of such persons in the community, i.e., comparison with

census figures indicate it has been disproportionately excluded; and 3) the underrepresentation is attributable to the prosecution's exercise of peremptory challenges, not excusals for cause or chance circumstances inherent in a random selection process. To rebut this prima facie case, the State must show a significant state interest justifies the underrepresentation of the excluded group. This burden would at least require that a neutral explanation for the challenge be offered but would not require justification equivalent to a challenge for cause.

2. Justice Harlan's view of retroactivity was adopted with respect to cases pending on direct review in *Griffith* v. *Kentucky*, 479 U.S. ___, 107 S.Ct. 708 (1987). Application of his analysis of retroactivity to cases pending on collateral review should result in the rule of *Batson* being applied to all cases pending on direct review when certiorari was denied in *McCray* v. *New York*, 461 U.S. 961 (1983). Justice Harlan believed a claim contained in a habeas corpus petition should be judged according to the constitutional standard dominant at the time the conviction became final to perform the function of habeas review of forcing state courts to toe the constitutional mark. With the denial of certiorari in *McCray*, the dominance of the long criticized rule of *Swain* v. *Alabama* 380 U.S. 202 (1965) ended. The constitutional correctness of any conviction which became final thereafter should not be judged by the standards of *Swain*. Extension of the rule of *Batson* to this class of cases would correct any inequity resulting from this Court's postponement of reexamination of the burden defendant would be required to sustain to establish an equal protection violation.

This limited extension of the benefits of *Batson* would not be inconsistent with the result reached in *Allen* v. *Hardy*, 478 U.S. ___, 106 S.Ct. 2878 (1986). Allen's con-

viction was final when certiorari was denied in *McCray*. Application of the three-pronged test of *Linkletter* v. *Walker*, 381 U.S. 618 (1965) to cases pending on direct review when *McCray* signaled a change of law weighs in favor of retroactive application of *Batson*. The rule of *Batson* is designed to eliminate a practice which threatens the ability of the jury to perform its truth-finding function. A prosecutor could not have justifiably relied on *Swain* to practice racial discrimination in jury selection and the impact of retroactive application of *Batson* would be minimal, the number of affected cases being limited.

Justice Harlan was persuaded that new rules should be applied to all nonfinal cases because retroactivity is an essential attribute of judicial decision making and disparate treatment of similarly situated defendants is intolerable. These considerations apply with equal force to convictions which are final. The interests of finality and allocation of resources, which Justice Harlan believed required that a distinction be made between final and nonfinal cases, are inadequate justification for the differential treatment of cases on direct and collateral review. Those interests are adequately protected by the limitation placed on the availability of federal habeas corpus review by *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Maintenance of a direct/collateral distinction is unnecessary to promote those same interests and should be abandoned.

3. *Swain* v. *Alabama*, 380 U.S. 202 (1965) did not depart from the principle that discriminatory jury selection practices violate the Equal Protection Clause. *Swain* created a presumption that a prosecutor acts for legitimate reasons in exercising his peremptory challenges to preserve the peremptory nature of the challenge. When a prosecutor volunteers his reasons for his exercise of his

peremptory challenge, those challenges need not be presumed to be legitimately exercised in order to avoid limiting the effectiveness of the challenge. The prosecutor's explanation should be examined to determine if the purposes of the challenge are being perverted and racial discrimination is being practiced.

Although no *Swain*-based claim was made in state court, this claim is not barred by procedural default pursuant to *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Respondents failed to raise this defense when this claim was argued in the district court and the court of appeals. The state court was given a fair opportunity to review the claim and it has obvious merit. Petitioner argued in state court that the prosecutor's explanation for his exercise of his peremptory challenges was a pretext for racial discrimination. The State argued the merits of this claim should be judged by the standards of *Swain*. The state court held *Swain* afforded petitioner no basis for relief. If the defense of procedural default has not been waived in these circumstances, *Cf. Granberry* v. *Greer*, 481 U.S. ___, 107 S.Ct. 1671 (1987), the action of the state court rejecting the claim on its merits allows a federal court to review the claim. *Ulster County Court* v. *Allen*, 442 U.S. 140 (1979).

ARGUMENT

I. THE PROSECUTION'S USE OF THE PEREMPTORY CHALLENGE TO DEFEAT THE POSSIBILITY THAT THE PETIT JURY WILL REPRESENT A FAIR CROSS SECTION OF THE COMMUNITY VIOLATES THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY.

In *Batson* v. *Kentucky*, 476 U.S. 79, 84 n.4 (1986), this Court declined to decide whether the fair cross-section requirement of the Sixth Amendment places any limita-

tion on the prosecution's ability to use peremptory challenges to exclude black persons from jury participation. Although the soundness of extending the fair cross-section requirement to the petit jury was questioned in *Lockhart* v. *McCree*, 476 U.S. 162 (1986), the issue was again not ultimately resolved because the excluded group in issue, Witherspoon-excludables, was not found to be distinctive for fair cross-section purposes. The ten jurors peremptorily excused by the prosecution from Teague's jury were black persons, members of a group this Court in *Lockhart* acknowledged to be distinctive. 476 U.S. at 175. The issue of whether the fair cross-section requirement may be invoked to invalidate the use of peremptory challenges to exclude members of a distinctive group from the petit jury is thus squarely raised in this case.

A. The Remedy For Discriminatory Use Of The Peremptory Challenge Provided by *Batson* v. *Kentucky* Does Not Adequately Protect The Interests Advanced By The Fair Cross-Section Requirement.

Although *Batson* eliminates some abuses of the peremptory challenge, its remedial effect is limited to cases where defendant is himself a member of the excluded group. *Batson*, 476 U.S. at 96. Other abuses of the peremptory challenge could be ended by recognizing that use of the challenge to eliminate the possibility of representation of any distinctive group on the jury, regardless of its relationship to the accused, is abhorrent to the constitutional concept of a jury trial. That defendant is not a member of the excluded group would not bar this Sixth Amendment claim. *Taylor* v. *Louisiana*, 419 U.S. 522, 526 (1975).

There are many contexts in which a prosecutor might attempt to exclude a distinctive group of which defendant is not a member from jury service. Racial issues may be

"inextricably bound up with the conduct of the trial," *Rosales-Lopez* v. *United States*, 451 U.S. 182, 189 (1981), so as to cause a prosecutor to prefer white jurors even though the defendant may himself be white. An example would be where a white civil rights activist is charged with a crime as a consequence of his civil rights activities or where his defense to a criminal charge is that he has been framed by law enforcement officials who are his antagonists. *Cf. Ham* v. *South Carolina*, 409 U.S. 524 (1973) (recognizing racial bias may infect such a trial where defendant is black).

Batson also does not address the issue of exclusion of female jurors from the petit jury where, as is the case in most criminal prosecutions, the defendant is male. Trial technique manuals counsel that as a general rule the male juror is preferable to the female juror. J. Appelman, Preparation and Trial 163-165 (1967); M. Belli, 3 Modern Trials 446 (2d ed. 1981); J. Doherty, Ready For Trial Your Honor 75 (1972); The Prosecutor's Deskbook 373 (Healy and Manak ed. 1971). Women are undesirable because they are "more responsive to emotional appeals, and, at least from a male point of view, are more unpredictable and subject to being deterred from properly voting for conviction by other irrelevant factors" or are a "distracting influence to male jurors—and to counsel." The Prosecutor's Deskbook, *supra*, at 373. Litigants are especially advised to avoid the female juror where the plaintiff, complainant or witness is an attractive woman, on the theory that "women are inordinately cruel to each other." Appelman, *supra*, at 164.

Discerning whether the accused, who may be of mixed or uncertain parentage, is a member of the excluded group, is also a potential dilemma in the application of *Batson* which could be minimized in the Sixth Amend-

ment context. *See People* v. *Crowder*, 161 Ill. App.3d 1009, 1046, 515 N.E.2d 783, 807 (1st Dist. 1987) (Pincham, J., dissenting); *People* v. *Seals*, 153 Ill. App.3d 417, 422, 505 N.E.2d 1107, 1111 (1st Dist. 1987).

In all of these instances it would be intolerable to permit the prosecution to deny members of a cognizable group the opportunity to serve as jurors, a result which would unquestionably be a departure from the jury ideal, merely due to the circumstance that the accused is not, or cannot be precisely characterized as, a member of the excluded group. Such abuse of the peremptory challenge would be ended if it were recognized that exclusion of any distinctive group, regardless of its relationship to the accused, is abhorrent to the constitutional concept of a jury trial.

B. The Sixth Amendment Guarantees The Accused The Selection Of A Petit Jury In Accordance With Procedures Which Provide A Fair Possibility Of Obtaining A Jury Representative Of The Community.

Selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial, although no requirement exists that petit juries actually mirror the community and reflect the distinctive groups in the population. *Taylor*, 419 U.S. at 538. *Taylor* held violative of the fair cross-section rule a special exemption for women, a distinctive group in the community, which eliminated them from the pools for jury service unless they filed a written declaration of a desire to serve. In *Duren* v. *Missouri*, 439 U.S. 357 (1979), a statute allowing women to exempt themselves from pools for jury service upon request was held to offend these same principles.

Neither *Taylor* nor *Duren* assign independent significance to the inclusion of distinctive groups on jury panels

separate from the effect their presence or absence on those panels would have on the composition of the petit jury. The systematic exclusion of a distinctive group from jury panels offends the Sixth Amendment, not because the group is excluded from the pool of jurors, but because its exclusion from that pool operates to exclude its members from the petit jury. Inclusion of a distinctive group provides the opportunity for a jury drawn from that pool to contain representative members of the group. *See McCray* v. *Abrams*, 750 F.2d 1113, 1128-1129 (2nd Cir. 1984), *vacated*, 106 S.Ct. 3289 (1986); *Booker* v. *Jabe*, 775 F.2d 762, 770-771 (6th Cir. 1985), *vacated*, 106 S.Ct. 3289, *aff'd on reconsideration*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 910 (1987).

The Sixth Amendment comprehends not merely that distinctive groups in the community not be excluded from the jury pool, but that the jury be selected in accordance with procedures that provide a fair possibility for obtaining a representative cross section of the community on the petit jury. *Williams* v. *Florida*, 399 U.S. 78, 100 (1970); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946). Selection of a jury from a pool drawn from a fair cross section of the community is not an end in itself but contemplates the possibility that the petit jury will be similarly comprised. The fair cross-section requirement would be illusory if any obstacle could be interposed to the representation of a distinctive group on the petit jury as long as the group was not excluded from the venire.

Any procedure, at any stage of jury selection, which denies the opportunity for a distinctive group in the community to participate in the deliberative process must be condemned as a violation of the Sixth Amendment. Trial by jury of less than six persons is unconstitutional because it decreases the opportunity for meaningful and

appropriate representation of a cross section of the community. *Ballew* v. *Georgia*, 435 U.S. 223, 237 (1978). A prosecutor's exercise of the peremptory challenge to exclude a distinctive group poses no less a threat to the possibility of a cross-sectional jury. Allowing a prosecutor to use the challenge to exclude members of a distinctive group, although the group may have been fairly represented in the jury pool, would render the fair cross-section guarantee a nullity.

C. Permitting A Distinctive Group To Be Excluded From The Petit Jury By Use Of The Peremptory Challenge Is Inconsistent With The Constitutional Concept Of A Jury Trial.

That the Sixth Amendment is violated not only when distinctive groups in the community are excluded from the venire or jury pool, but also when those groups are denied the opportunity to participate in the deliberation process as petit jurors, is evident from examination of the same consideration which persuaded this Court in *Taylor* that the constitutional concept of a jury trial comprehends a jury drawn from a fair cross section of the community. Whether the fair cross-section requirement prevents exclusion of a distinctive group from the petit jury as well as from the pool from which that jury is drawn is resolved by examining the function the fair cross-section requirement performs and its relation to the purposes of the jury trial. If the requirement performs a function essential to the purpose of the right to trial by jury, it is an indispensable component of the Sixth Amendment. *Williams*, 399 U.S. at 99, 100. Extension of the requirement that a fair possibility exist that the petit jury will reflect a cross section of the community is not only compatible with, but is mandated by, the constitutional concept of a jury trial.

The right to trial by jury is guaranteed to the criminal accused as a shield against government oppression. *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). Its function is to interpose between the accused and the accuser the common-sense judgment of the community as a hedge against the overzealous and mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. *Williams*, 399 U.S. at 100; *Taylor*, 419 U.S. at 530. The broad representative character of the jury provides an assurance of diffused impartiality. *Thiel*, 328 U.S. at 277 (Frankfurter, J., dissenting).

If this prophylactic purpose is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool, *Taylor*, 419 U.S. at 530, neither can it be served if a distinctive group is excluded from the petit jury by peremptory challenge. In both instances the quality of community judgment represented by the jury is diluted. *Taylor*, 419 U.S. at 535. The counterbalancing of various biases, which is critical to the accurate application of the common sense of the community to the facts of any given case, suffers. *Ballew*, 435 U.S. at 234. As this Court recognizes:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters v. *Kiff*, 407 U.S. 493, 503-504 (1972).

Full community participation in the administration of criminal law is also critical to public confidence in the fairness of the criminal justice system. *Taylor*, 419 U.S. at 530. To perform its high function in the best way, justice must satisfy the appearance of justice. *Re Murchison*, 349 U.S. 133, 136 (1954). A jury selection practice which creates the appearance of bias in the decision of an individual case casts doubt on the integrity of the whole judicial process. *Peters*, 407 U.S. at 502, 503. Exclusion from jury service of a large group of individuals, not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, undeniably gives rise to an appearance of bias. *Lockhart*, 476 U.S. at 176.

Where a prosecutor employs peremptory challenges to engineer the wholesale exclusion of a distinctive group from a petit jury, public confidence in the integrity of the criminal justice system is shaken and the appearance of unfairness is created. A question will inevitably arise regarding the quality of justice being sought when members of that group are deemed unsuitable for service no matter what their individual characteristics may be.

Exclusion from jury service of otherwise qualified groups is also at war with our basic concepts of a democratic society and a representative government. *Smith* v. *Texas*, 311 U.S. 128, 130 (1940). Our notions of what a proper jury is have developed in harmony with these concepts. *Glasser* v. *United States*, 315 U.S. 60, 85 (1941). It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community, *Smith*, 311 U.S. at 130, and not the organ of any special group or class. *Glasser*, 315 U.S. at 60. The exclusion of elements of the community from participation contravenes the very idea of a jury composed of the peers or equals of the person whose

rights it is selected or summoned to determine. *Ballew*, 435 U.S. at 237. To disregard the principle that jury competence is an individual rather than group or class matter opens the door to class distinctions and discriminations which are abhorrent to the democratic ideal of trial by jury. *Thiel*, 328 U.S. at 220.

D. Existing Standards May Be Employed To Prove A Violation Of The Fair Cross-Section Requirement.

Duren v. *Missouri*, 439 U.S. 357, 364 (1979) provides standards which may be adapted to determine whether a petit jury has been selected in violation of the fair cross-section requirement of the Sixth Amendment. The defendant must initially establish a prima facie violation of the requirement. He succeeds if he can demonstrate that 1) the group alleged to be excluded is a distinctive group in the community; 2) representation of this group on the petit jury is not fair and reasonable in relation to the number of such persons in the community; and 3) the underrepresentation is attributable to the prosecutor's exercise of his peremptory challenges.

What is a distinctive group within the meaning of the fair cross-section requirement has never been precisely defined other than that the concept of distinctiveness must be linked to the purposes of the requirement and does not include groups defined solely in terms of shared attitudes which either prevent or substantially impair members of the group from performing the duties of a juror. *Lockhart*, 476 U.S. at 174. Because communities differ at different times and places, the concept of what comprises a fair cross section is not immutable and varies according to time or place. *Taylor*, 419 U.S. at 537.

The second prong of the prima facie case may be established by a demonstration that a cognizable group is

underrepresented in proportion to its position in the community as documented by the U.S. census. *Duren*, 439 U.S. at 364.

The third prong requires that the underrepresentation be attributable to specific action of the prosecutor. No demonstration of systematic exclusion of the dimension found in *Duren* need or should be required. The trial court during the selection process can observe if it is the result of chance circumstances inherent in any random selection process, the excusal of a juror for cause, or a party's exercise of peremptory challenges, which interferes with the possibility that the jury will reflect a fair cross section of the community.

To rebut this prima facie case, the State must justify its infringement on the possibility of a representative jury by demonstrating that a significant state interest is manifestly and primarily advanced by its exercise of the challenges which resulted in the disproportionate exclusion of a distinctive group. *Duren*, 439 U.S. at 367-368. This burden would at least require the prosecution to provide a case-related neutral explanation for its exercise of its challenges. *Batson*, 476 U.S. at 98. The prosecutor should be required to point to some aspect of the challenged juror's background or beliefs which provide a reasonable, objective basis to question the juror's impartiality. For example, an adequate state interest might exist where a juror believes a relative has been treated unfairly by the police or prosecution, but insists he could put that belief aside and judge the case to be tried on its own merits. While the juror would not be subject to a challenge for cause, the prosecution's interest in securing jurors in whose fairness it has confidence would provide justification for exclusion of the juror, although the result would be underrepresentation of a cognizable group on the jury.

E. No Significant State Interest Was Served By The Total Exclusion Of Black Jurors From Petitioner's Jury As A Result Of The Prosecution's Use Of Its Peremptory Challenges.

The facts of this case provide a vivid demonstration of the extreme abuse of the peremptory challenge possible should the Sixth Amendment place no limitation on a prosecutor's interference with the possibility that the jury will reflect a cross section of the community. Thirty-six jurors were examined by the trial court in this case from which twelve were selected to try the issue of Teague's guilt or innocence. Of those thirty-six, four were excused for cause. (S.R. 27, 116, 119, 147) The racial identity of the jurors excused for cause is not revealed by the record. Of the remaining thirty-two jurors, eleven, or approximately one-third, are black. The prosecution exercised each of the ten peremptory challenges allotted it by statute to excuse a black juror. The defense also exercised all ten of its challenges, one against a black woman who was married to a police officer. The result was the selection of an all white jury. (J.A. 3-4)

These facts establish a prima facie violation of the Sixth Amendment. The black persons excluded from the petit jury are a group which is recognized as being distinctive within the meaning of the fair cross-section rule. *Lockhart*, 476 U.S. at 175. Since Teague was tried by a jury from which all potential black jurors had been excluded, black jurors were not represented on the jury fairly and reasonably in relation to the number of such persons in the community from which the jury was drawn. Census figures indicate 25.62% of the population of Cook County, the community from which Teague's jury was drawn, was comprised of black persons in 1980. U.S. Bureau of the Census, County and City Data Book (1983). Approx-

imately one-third of the venire from which the petit jury was selected was black. The complete exclusion of black persons from the petit jury was disproportionate to both the percentage of black persons in the community and on the venire. The peremptory challenge was employed to methodically eliminate each and every black person, save one, from the jury. The underrepresentation of black jurors on the petit jury is attributable to the State's exercise of its peremptory challenges.

No significant state interest was advanced to justify the exclusion of black jurors. *Duren*, 439 U.S. at 368. The explanation offered by the prosecutor who selected Teague's jury was that challenges were exercised to achieve a balance of men, women and age groups. (J.A. 3) An examination of the record shows that the explanation offered by the prosecutor for his exercise of his challenges was disingenuous. It was not essential to his stated objective of a balance that the jury be unrepresentative of black citizenry. A chart outlining the sequence of selection of the jurors from among the thirty-two jurors who withstood challenges for cause follows:[1]

	State		Defense		Seated
	Challenge	**Acceptance**	**Challenge**	**Acceptance**	
(1)	black male				
(2)	black female				
(3)		white male	X		
(4)		white female	X		
(5)		white male		X	X
(6)	black female				
(7)		black female	X		
(8)	X			black female	

[1] This chart is adapted from a chart contained in the unissued panel opinion, found in Appendix A, p. 26 of the petition for writ of certiorari.

	State		Defense		Seated
	Challenge	**Acceptance**	**Challenge**	**Acceptance**	
(9)		X		white male	X
(10)		X		white male	X
(11)		white female	X		
(12)			white male		
(13)	X			black female	
(14)	black female				
(15)		white male		X	X
(16)		white male	X		
(17)	black female				
(18)		white male	X		
(19)		white female		X	X
(20)	black female				
(21)		white female		X	X
(22)		X		white male	X
(23)		X		white female	X
(24)		white male		X	X
(25)		white male	X		
(26)		white male		X	X
(27)		white male	X		
(28)	X			black female	
(29)	black female				
(30)		white female		X	X
(31)			white female		
(32)		X		white female	X

The first panel tendered to the State consisted of two men and two women.[2] Although this panel was "balanced" the State promptly challenged a male and a female juror,

[2] The jury was selected in three panels of four jurors each. After the first panel of four jurors was examined by the court, it was tendered to the prosecution for exercise of its peremptory challenges. Other jurors were substituted for challenged jurors. When the State was satisfied with a panel of four jurors, the panel was tendered to the defense for any challenge. Any change in the composition of the panel as a consequence of defense challenges resulted in the panel being retendered to the State for challenge or acceptance. This process continued until both parties agreed to the composition of the panel.

both of whom were black. The State excused three black females during selection of that panel, none of whom it accepted to further achievement of the "balance" it desired. As to the second panel, whose final composition was one male and three females, the State excused two black females, at the same time finding acceptable three white males and three white females. Prior to exercise of any defense challenges against the final panel, the State accepted a panel of four men, which had it been accepted by the defense would have resulted in a jury composed of nine males and three females, which hardly qualifies as a balance of men and women. During selection of that panel, the State excused only two females, both of whom were black. The final two white females on the jury were selected after the State had exhausted its peremptory challenges; their appearance was not the result of the State's design. The suggestion that it was the prosecutor's quest for a balance of men and women on the jury which resulted in the underrepresentation of black jurors has no basis in fact.

The prosecutor's objective of seeking a balance of age groups also is unsupported. Although the record does not reflect the ages of all the jurors, four of the persons who sat on the petit jury had grown children (S.R. 67, 131, 138, 159), two had both school-age and grown children (S.R. 54-55, 71), one had held the same employment for thirty-seven years (S.R. 129), and another was on disability and living with his retired sister. (S.R. 142-144) Two had school-age children and one was a 22 year old student. (S.R. 99, 120, 164) Three of the black jurors excused by the State were students and one was 19. (S.R. 89, 92, 111, 123) The remainder had school-age or grown children or substantial work experience. (S.R. 31, 35, 52, 73, 153, 156) At the time the State excused Ms. Turner

and Ms. Moore, black women who were students, the remaining panel was composed of three white men, all of whom had adult children. (S.R. 55, 67, 68, 71, 92, 96) The only young person who sat on the jury, a 22-year old white female college student, was selected after the State exhausted its peremptory challenges. (S.R. 164) The objective of a balance of age groups was not the cause of the underrepresentation of black jurors because the State never achieved its purported objective, the jury being predominately composed of older persons, and young black jurors were challenged when no younger age groups were represented on the jury. The expressed objective of balance is a belatedly contrived excuse to mask the State's misconduct.

This Court has cautioned that we must be ever vigilant in resisting any tendencies, no matter how slight, toward selecting jurors by any method which would prevent the opportunity for trial by a representative jury. *Glasser*, 315 U.S. at 86. The injury that is prevented is not limited to the defendant, but extends to the jury system, the law as an institution, the community at large, and the democratic ideal reflected in the processes of our courts. *Ballard* v. *United States*, 329 U.S. 187, 195 (1946). Disallowance of the prosecution's use of the peremptory challenge to eliminate minority participation from a petit jury, as was accomplished at the trial of this case, is crucial to preservation of the constitutional concept of jury trial. The accused and the community both deserve a criminal justice system in which they have full confidence.

II. RETROACTIVE APPLICATION OF THE RULE OF *BATSON* V. *KENTUCKY* SHOULD BE EXTENDED AT A MINIMUM TO THOSE DEFENDANTS WHOSE CONVICTIONS WERE NOT FINAL WHEN CERTIORARI WAS DENIED IN *MCCRAY* V. *NEW YORK*.

In *Griffith* v. *Kentucky*, 479 U.S. ___, 107 S.Ct. 708 (1987), the rule of *Batson* v. *Kentucky*, 476 U.S. 79 (1986)

was held to apply retroactively to all defendants whose convictions were not final when the rule was announced. *Griffith* followed the rationale of *United States* v. *Johnson*, 457 U.S. 537 (1982) and *Shea* v. *Louisiana*, 470 U.S. 51 (1985) that applying newly declared constitutional rules to cases pending on direct review is consonant with basic norms of constitutional adjudication and furthers the goal of treating similarly situated defendants similarly, but abandoned the "clear break" exception enunciated in *Johnson*, 457 U.S. at 549, as inconsistent with the principles which persuaded the Court to extend the benefits of new rules to defendants whose convictions are not final.

The reasoning of *Griffith* has its origin in the separate opinions of Justice Harlan in *Desist* v. *United States*, 394 U.S. 244, 256 (1969) (Harlan J., dissenting) and *Mackey* v. *United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring and dissenting), in which he proposed a view of retroactivity which distinguished between cases pending on direct and collateral review. This Court has not yet adopted Justice Harlan's view with respect to cases pending on collateral review.[3] If that view or a modified version is adopted here, the benefits of *Batson* should be extended at a minimum to all defendants whose convictions were not final when certiorari was denied in *McCray* v. *New York*, 461 U.S. 961 (1983).[4]

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[3] In *Allen* v. *Hardy*, 478 U.S. ____, 106 S.Ct. 2878 (1986), *Batson* was held non-retroactive to final convictions, but on the ground that application of the three-pronged analysis of *Linkletter* v. *Walker*, 381 U.S. 618 (1965) supported such a result.

[4] On May 31, 1983, certiorari was denied in *McCray* v. *New York*, 461 U.S. 961 (1983). Certiorari was denied in *Teague* v. *Illinois*, 464 U.S. 867 (1983) on October 3, 1983.

A. Because The Rule of *Swain* v. *Alabama* Was Not The Dominant Constitutional Standard When Certiorari Was Denied In *McCray* v. *New York*, *Batson* Should Be Retroactively Applied To All Cases Then Pending On Direct Review.

Justice Harlan believed that claims contained in habeas corpus petitions should be judged according to constitutional standards existing at the time the conviction became final. In his view, the choice of what law should be applied should be made by focusing on the purpose of the writ, *Mackey*, 401 U.S. at 682, which is primarily deterrence, i.e., its threat serves as an incentive for trial and appellate courts to conduct their proceedings in a manner consistent with established constitutional standards. *Desist*, 394 U.S. at 262-263. To perform this function of forcing courts to toe the constitutional mark, habeas corpus petitions need only be judged according to the law prevailing at the time a conviction becomes final. *Mackey*, 401 U.S. at 687.

At the time Teague's conviction became final, the state of the law respecting the limitations on the prosecution's use of its peremptory challenges to exclude members of a racial group was not in repose. The precedential effect of *Swain* v. *Alabama*, 380 U.S. 202 (1965) had been destroyed by the denial of certiorari in *McCray* v *New York*, 461 U.S. 961 (1983). A majority of the Justices (opinion of Stevens, J., joined by Blackmun and Powell, JJ., respecting the denial of certiorari, and Marshall, J., joined by Brennan, J., dissenting) recognized that the issue of whether the Constitution prohibits use of the peremptory challenge to exclude members of a particular group from the jury was an important one which ultimately would be resolved by the Court, but disagreed as to timing. Justice Stevens concluded the issue would be

better addressed by first allowing the states to serve as laboratories in which the issue received further study. Reexamination of *Swain* was intentionally postponed, but the effect was to signal lower courts that *Swain* could be rethought and no longer controlled their resolution of the issue. Since they were cast in the role of laboratories where the law was open to experimentation, *Swain* was not binding authority and lower courts could not determine after *McCray* if they were "toeing the constitutional mark." The resulting inequity[5] can only be corrected by extension of the benefits of *Batson* to all those thus affected.[6]

Justice Harlan recognized that it would often be difficult for a habeas court to define the constitutional standards prevailing at the time a conviction became final. The court would be "required to chart out the proper implications of the governing precedents" rather than simply applying new rules to those cases pending at the time the decision is announced. He believed that simplicity should not be purchased at the cost of compromising the principle that a habeas petitioner is entitled to have his conviction judged according to constitutional standards dominant at the time it became final. *Desist*, 394 U.S. at 268; *Mackey*, 401 U.S. at 695.

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[5] In his petition for writ of certiorari on direct appeal, Petitioner counseled against delay in resolution of the problem of misuse of the peremptory challenge, noting most state courts were reluctant to reexamine *Swain*. *See Gilliard* v. *Mississippi*, 464 U.S. 867, 871 n.3 (1983) (Marshall, J., dissenting).

[6] This class would consist of all defendants whose convictions were not final when certiorari was denied in *McCray* on May 31, 1983 but became final prior to the announcement of the *Batson* rule on April 30, 1986.

The rule of *Swain* cannot be considered the dominant constitutional standard at the time Petitioner's conviction became final in light of the impact of *McCray*. To paraphrase Justice Harlan, "it is hard to believe that any lawyer worthy of the name could, after reading *[McCray]* rely with confidence on the continuing vitality of the *[Swain]* rule. Nor is it by any means clear . . . that it would have been improper for a lower court to have declined to follow *[Swain]* in light of *[McCray.]*" *Desist*, 394 U.S. at 265. Because the dominance of *Swain* ended when certiorari was denied in *McCray*, the constitutionality of Teague's conviction should not be judged according to the standard of *Swain*.

A central concern of Justice Harlan was that rules of retroactivity not unfairly discriminate among similarly situated defendants. He recognized that drawing a distinction between direct and collateral attacks on convictions would result in some discrimination. His willingness to accept this result, in the face of the competing considerations of the need for finality and allocation of limited resources, was premised on the assumption that it could be concluded with assurance that a conviction was perfectly free from error when it became final. *Mackey*, 401 U.S. at 689-691.

No such assurance exists here. The inequity which defendants suffer because their jurisdiction did not provide a remedy for the prosecution's discriminatory jury selection practices cannot be forgiven in the interests of finality or conservation of resources. *McCray* undoubtedly signaled that *Swain* should be reexamined, yet left it entirely to the discretion of lower courts whether to follow precedent that was discredited, although not expressly overruled. Correction of this aberration can be achieved by extension of the benefits of *Batson* to all defendants

whose cases were pending on direct review when the dominance of *Swain* ended.

B. Extension Of The Benefits Of The Rule Of *Batson* To All Cases Pending On Direct Review When Certiorari Was Denied In *McCray* Would Not Be Inconsistent With The Result Reached In *Allen* v. *Hardy*.

Consistency with the result reached in *Allen* v. *Hardy*, 478 U.S. ____, 106 S.Ct. 2878 (1986) does not demand that this Court deny the benefits of *Batson* to defendants whose convictions became final only after denial of certiorari in *McCray*. First, Allen's conviction was final and he was seeking collateral relief from his conviction when the *McCray* denial was announced, *U.S. ex rel. Allen* v. *Hardy*, 556 F.Supp. 464 (N.D.Ill. 1983). The *Allen* Court therefore had no cause to question the vitality of *Swain* while *Allen* was pending on direct appeal.

Second, application of the three-pronged analysis of *Linkletter* v. *Walker*, 381 U.S. 618 (1965) to that class of cases which became final after *McCray* but prior to the *Batson* opinion being delivered would have resulted in the conclusion that the interests considered were weighted in favor of retroactive application of *Batson*.

Foremost among the factors weighed in deciding to whom the benefits of a new rule extend is the purpose of the rule at issue. If the purpose is designed to enhance the accuracy of the trial, retroactivity is favored. Controlling significance is given to the extent of reliance on the old rule and the impact retroactive application of the new rule would have on the criminal justice system only where the purpose of the rule does not clearly favor retroactivity or prospectivity. *Brown* v. *Louisiana*, 447 U.S. 323, 328 (1980); *Solem* v. *Stumes*, 465 U.S. 638, 643 (1984).

That the rule of *Batson* bears on the truth-finding function of a criminal trial is beyond dispute. *Allen*, 106 S.Ct. at 2880; *McClesky* v. *Kemp*, 481 U.S. ____, 107 S.Ct. 1756, 1775 (1987). The rule is not designed to be a mere deterrent nor is its role purely prophylactic. Racial discrimination in the selection of a jury is a stimulant to race prejudice which is an impediment to securing equal justice. It denies the accused the protection against the arbitrary exercise of power by a prosecutor or a judge that a trial by jury is intended to secure. *Batson*, 476 U.S. at 86-88. Being a practice that undermines the jury's ability to perform its function, it poses a significant threat to the truth-finding process. *Brown*, 447 U.S. at 334.

Safeguards do not exist which significantly minimize the likelihood of past injustices caused by discriminatory jury selection. Although this Court has noted the existence of procedures, such as voir dire and the court's instructions, which could protect these same interests, *Allen*, 106 S.Ct. at 2881 n.2, the protection these measures provide is largely illusory. A defendant is unable to question jurors specifically as to racial bias unless he can demonstrate a significant likelihood exists that racial bias will influence a jury. *Ristaino* v. *Ross*, 424 U.S. 589, 596 (1976). A prosecutor inclined to discriminate in the selection of a jury may not limit his misconduct to those cases in which such a demonstration can be made. While a court may direct jurors in concluding instructions not to be influenced by any prejudices they may harbor, such an instruction does not insure that only jurors free from prejudice are selected for jury duty, or that only those sit who are able to arrive at an independent judgment apart from any prejudice they may have. The efficacy of such an instruction is also questionable where those same jurors have witnessed the apparently court-sanctioned spectacle of a jury selected in a race-conscious manner.

While no viable remedy existed to prevent miscarriages of justice as a result of discrimination in the selection of jurors prior to *Batson*, retroactive extension of the benefits of *Batson* would not result in windfall benefits for defendants who have suffered no constitutional deprivation. *Michigan* v. *Payne*, 412 U.S. 47, 53 (1973). Only those defendants able to demonstrate that the prosecutor's use of the peremptory challenge was racially motivated, i.e., who have suffered the injury *Batson* is designed to eliminate, will reap the benefit of retrial.

Retroactive application of *Batson* would also result in the award of relief which would remedy the injury suffered. Unlike other contexts where the interest sought to be protected has been damaged and cannot be corrected, *Linkletter*, 381 U.S. at 637, the injury which occurs when an accused is tried by a jury from which members of his race have been excluded is not irreparable. The confidence of the public and the accused that justice has been done can be restored by trial by a jury selected in a nondiscriminatory manner.

The factors of reliance on the old rule and the impact of retroactive application of *Batson* on the administration of justice do not weigh heavily against retroactivity where the class of potential litigants is limited to cases which were not final when certiorari was denied in *McCray*.[7] Since trial and appellate courts and prosecutors were put on notice by *McCray* that the rule of *Swain* was certainly going to be reexamined by the Supreme Court at some date in the not distant future, a prosecutor's continued reliance on the heavy evidentiary burden of *Swain* was risky. That *Swain* was under continued attack and some

[7] There is no indication that the limited retroactivity given *Batson* in *Griffith* has had any adverse effect.

courts used their own state constitutions or the Sixth Amendment to provide a remedy for discriminatory use of the peremptory challenge notwithstanding *Swain*, diminishes the persuasiveness of the prosecution's reliance on *Swain*. *Roberts* v. *Russell*, 392 U.S. 293, 295 (1968). *Swain* left unquestioned the principle established in *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), that the state denies a black defendant equal protection of the laws when it places him on trial before a jury from which members of his race have been purposefully excluded. *Batson*, 476 U.S. at 89. A prosecutor could not have justifiably relied on *Swain* as sanctioning discriminatory jury selection practices. *Batson*, 476 U.S. at 101 (White, J., concurring). Even if a prosecutor believed the evidentiary burden of *Swain* controlled, a defense of his exercise of his challenges remained a possibility which had to be anticipated should a defendant question a prosecutor's motives and undertake to carry his burden of proof. In short, no prosecutor could or should have believed that race was a proper basis to exercise a peremptory challenge or that his conduct was immune from scrutiny under *Swain*.

Nor is the impact on the administration of justice great due to the limited number of cases involved. Retrial will not be required in every instance in which a defendant claims he is entitled to the benefits of *Batson*, only in those instances in which he can persuade the trial court that discrimination has occurred. Further winnowing will occur with application of various state or federal procedural rules which limit the number of successful litigants. *Hankerson* v. *North Carolina*, 432 U.S. 233, 244 n.8 (1977).

C. No Reasoned Basis Exists To Extend The Benefits Of The *Batson* Rule To Litigants In Cases Pending On Direct Review And To Deny Relief To Equally Deserving Litigants Who Are Seeking Collateral Relief From Their Convictions.

Justice Harlan was convinced that new constitutional rules must at a minimum be applied to cases pending on direct review when the rule is announced. To hold otherwise in his view would constitute an indefensible departure from the model of judicial review, allowing the Court to simply fish one case from the stream of appellate review, use it as a vehicle for pronouncing new constitutional standards, and then permit a stream of similar cases to flow by unaffected by that rule. *Mackey*, 401 U.S. at 679. By picking and choosing whom among similarly situated defendants should receive the benefits of a new rule, the Court acts as a legislature or court of revision, not a court of law. *Desist*, 394 U.S. at 259; *Mackey*, 401 U.S. at 677-679.

The conviction that retroactivity is an essential attribute of judicial decision making and that disparate treatment of similarly situated defendants is intolerable should not dissipate merely because a defendant is pursuing an avenue of relief beyond direct appeal. This Court was persuaded to reject the "clear break" exception to the rule of retroactivity due to recognition that the "mere fortuities of the judicial process" should not be the basis for distinguishing whom among equally deserving litigants receive the benefits of a new rule. *Griffith*, 107 S.Ct. at 716. Neither should the direct/collateral distinction be maintained where it is the "vagaries of the appellate process" which unavoidably create inequities in availability of relief. *Johnson*, 457 U.S. at 567-568 (White, J., dissenting).

Considerations of finality do not justify the distinction between direct and collateral review. A new trial is not a significantly less burdensome remedy when it is imposed on direct review than when it is ordered on habeas. *Shea*, 470 U.S. at 64 n.1 (White, J., dissenting). The line drawn between direct and collateral review is purely arbitrary. *Johnson*, 457 U.S. at 567 (White, J., dissenting). It allows for no exception to the general rule of nonretroactivity for state collateral proceedings where the state court should itself determine whether its interests in finality of its judgments supply justification to deny extension of the benefits of a new rule to a defendant seeking state post-conviction relief.

Justice Harlan found the interests of finality significant only because he found disquieting the rule of *Fay* v. *Noia*, 372 U.S. 391 (1963) which "opened the door for large numbers of prisoners to relitigate their convictions each time a 'new' constitutional rule was announced" despite the fact that the new rule had not been suggested in the original proceedings. *Desist*, 394 U.S. at 261. Finality became paramount only as it provided a means to contain the effect of decisions Justice Harlan believed "constitute an unsound extension of the historic scope of the writ and an unfortunate display of insensitivity to the principles of federalism which underlie the American legal system." *Mackey*, 401 U.S. at 685. It was the availability of relief on habeas review to prisoners raising new claims never addressed by state courts which Justice Harlan believed frustrated the state's interests in finality.

Developments since *Fay* v. *Noia*, however, have eliminated the specter of prisoners continually relitigating the constitutionality of their convictions each time a new rule is announced. Extension of the benefits of a new rule to habeas corpus petitioners does not entitle them to those

benefits if the interests of comity and finality would otherwise be disserved. Those interests are addressed by the rule of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), that a state procedural default bars federal habeas corpus review absent a showing of cause for noncompliance with a state procedural rule and a showing of actual prejudice. See *Engle* v. *Issac*, 456 U.S. 107, 134 n.43 (1982) (recognizing that a distinction exists between the retroactive availability of a constitutional decision and the right to claim that availability after a procedural default).

The cause and prejudice test of *Wainwright*[8] addresses the concern that interests of comity and finality are not adequately respected when prisoners are awarded relief from their convictions on the basis of constitutional rules announced after their convictions become final. Construction of an artificial dividing line between direct and collateral review is unnecessary to promote those same interests and should be abandoned.

III. *SWAIN* V. *ALABAMA* PERMITS A PROSECUTOR'S VOLUNTEERED EXPLANATION FOR HIS EXERCISE OF HIS PEREMPTORY CHALLENGES TO BE EXAMINED TO DETERMINE WHETHER THE EXPLANATION IS LEGITIMATE OR A MERE PRETEXT FOR RACIAL DISCRIMINATION.

If *Batson* v. *Kentucky*, 476 U.S. 79 (1986) has no retroactive application to cases pending on collateral review, Teague is entitled to relief from his conviction nonetheless

[8] Additional limitations on the availability of collateral relief are found in *Stone* v. *Powell*, 428 U.S. 465 (1976), the exhaustion of state remedies requirement, *Rose* v. *Lundy*, 455 U.S. 509 (1982), and the presumption of correctness of state court findings, *Sumner* v. *Mata*, 449 U.S. 539 (1981), all of which promote respect for the finality of state court judgments.

because the record demonstrates an equal protection violation pursuant to *Swain* v. *Alabama*, 380 U.S. 202 (1965). Although he was not required to do so, the trial prosecutor in this case volunteered his reasons for the exercise of his peremptory challenges. *Swain* permits those reasons to be reviewed to determine whether the purpose of the peremptory challenge is being perverted. *Weathersby* v. *Morris*, 708 F.2d 1493, 1496 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984); *Garrett* v. *Morris*, 815 F.2d 509, 511, 513 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 233 (1987). The explanation offered by the prosecutor for his decision to exercise all ten of his challenges to exclude only black venirepersons from the petit jury was a pretext for racial discrimination. This equal protection violation should be recognized as affording a basis to award Teague relief from his conviction.

A. An Equal Protection Violation Can Be Established Consistent With *Swain* Other Than By Proof That The Prosecution Consistently And Continuously Excluded A Racial Group From Petit Juries.

The court of appeals interpreted *Swain* to require that a defendant meet his burden of demonstrating the prosecution exercised its peremptory challenges in violation of the Equal Protection Clause by proof that black jurors are systematically excluded from petit juries in case after case. The court rejected the notion that a demonstration that the prosecution exercised its peremptories on the basis of race in a single case could establish an equal protection claim. *Teague* v. *Lane*, 820 F.2d 832, 834 n. 6 (1987). *Swain* does not contain the limitations ascribed to it by the court of appeals.

Swain did not question the soundness of the principle enunciated in *Strauder* v. *West Virginia*, 100 U.S. 303 (1880) that a state's purposeful or deliberate denial to

blacks on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause. *Swain*, 380 U.S. at 205. After reviewing the purpose of the peremptory challenge system and the function it serves, the court did conclude a presumption should exist in any given case that the prosecutor uses his challenges to obtain a fair and impartial jury to try the case before the court. This presumption could not be overcome and the prosecutor required to justify his challenges merely by allegations that in a single case the prosecutor removed all blacks from the jury or that they were removed because they were black. *Swain*, 380 U.S. at 222. The presumption might be overcome by proof that

> the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes serve on petit juries,

but evidence that no black person served on a petit jury over an extended period of time would not satisfy this burden. *Swain*, 380 U.S. at 223. Absent from such proof would be a showing of the prosecution's responsibility for the exclusion. *Swain*, 380 U.S. at 227.

Swain contains no rejection of the possibility that a defendant might demonstrate an equal protection violation by a prosecutor's use of peremptory challenges in a single case. *Swain* merely clothed the prosecution's use of its challenges in a presumption of correctness, insulating them from inquiry except where that presumption was overcome, and rejected the argument that the presumption could be overcome solely by an allegation that the prosecutor peremptorily removed all the black jurors or

that he did so on account of race. That it was not the intent of *Swain* to require proof of a consistent exclusion of blacks over a period of time as the only means to overcome the presumption is evident from the observation of the author of *Swain* that it would not have been inconsistent with *Swain* for the trial judge to invalidate peremptory challenges of black jurors if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors. *Batson*, 476 U.S. at 101 n.* (White, J., concurring). *Batson* attributed the requirement that the presumption of correctness be overcome by proof of repeated striking of blacks over a number of cases to lower court interpretation of *Swain*. 476 U.S. at 92. Nothing in *Swain* suggests that proof of repeated strikings is the sole or exclusive method of making the requisite showing of perversion of the peremptory challenge.

When a prosecutor volunteers his explanations for his peremptory challenges, the considerations which persuaded the Court to presume that a prosecutor acts for valid reasons in exercising his challenges no longer obtain. The peremptory nature of the challenge was thought worthy of preservation because it enabled the parties to select jurors with the ability to decide the case on the basis of the evidence before them. *Swain*, 380 U.S. at 219. If a prosecutor's motivation for each challenge was subject to scrutiny, a great many uses of the challenge would be banned. *Swain*, 380 U.S. at 222. The Court was not prepared to make this sacrifice.

If the prosecution reveals its motivation for its challenges without compulsion, no deleterious limitation has been placed on the exercise of its challenges. The prosecution remains free to exercise its challenges as it sees fit on the ground of any real or perceived bias detected in a

juror. It is unnecessary to presume that the prosecution exercises its challenges for acceptable reasons to allow it to act on the basis of real or imagined partiality which is incapable of articulation or not easily articulated. The prosecution has determined that its motivation is articulable and it has not been intimidated by the prospect of being forced to state its reasons to be unduly conservative in its exercise of its challenges.

The principle that the Equal Protection Clause is offended when black persons are excluded from participation as jurors on account of race is unassailable. No reason exists to decline to examine the reasonableness and sincerity of a prosecutor's explanation for the exercise of peremptory challenges where it is volunteered. The court should satisfy itself that the prosecutor's challenges are based on constitutionally permissible trial-related considerations and that the proffered reasons are genuine and not merely a pretext for discrimination.

B. The Explanation Volunteered By The Prosecutor For His Peremptory Challenge Of Ten Black Jurors Is A Pretext And Demonstrates That The Prosecutor's Actual Motivation Was Racial Discrimination.

An examination of the reason volunteered by the prosecutor for his exercise of his peremptory challenges in Teague's case reveals that the proffered explanation was a pretext, intended to disguise his actual motivation which was to obtain a jury as nearly composed solely of white jurors as the prosecutor's manipulative use of his challenges would permit. As demonstrated in Argument I, *supra*, the record affirmatively refutes the contention that the stated objective that the jury reflect a balance of men, women and age groups resulted in the exclusion of black jurors.

Additional support is found for this conclusion in the prosecutor's decision not to strike white jurors who differed in no significant way from the excluded black jurors. *Garrett*, 815 F.2d at 514.[9] Both Mrs. Munoz and Ms. Jones were employed, had two school-age children and had no jury or psychiatric experience. (S.R. 120-121, 156-157) The prosecutor excused only Ms. Jones, who is black. Mrs. Hall was the victim of an unsolved crime and was employed. (S.R. 28, 29, 35) Mrs. Hook was employed and her father was the victim of an unsolved crime. (S.R. 125-126) The prosecutor excused only Mrs. Hall, who is black. Ms. Hefferman, who was separated from her husband, employed, had school-age children and experience with psychiatrists, was acceptable to the State. (S.R. 36, 45) Ms. Jones, who was divorced, employed and had school-age children (S.R. 155, 156), and Mrs. Hampton, who had used the services of a psychiatrist (S.R. 53), were not. Only Ms. Jones and Mrs. Hampton are black. Mrs. Knoeizer and Ms. Winston were both employed, married, had employed husbands and at least one grown child (S.R. 152-153 79-80), but the prosecutor was dissatisfied only with Ms. Winston, who is black.

These facts support the conclusion that the explanation proffered by the prosecution was a pretext for purposeful discrimination. Such discrimination has not been tolerated since *Strauder* and *Swain* offers the prosecutor no protection from the consequences of his misconduct.

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[9] The state appellate court also observed that "an examination of the record shows that white jurors who fell within the men, women and age groups to which the State referred were not excused peremptorily by the State." *People* v. *Teague*, 108 Ill. App.3d 891, 439 N.E.2d 1066, 1069-1070 (1st Dist. 1982).

C. The Failure Of Petitioner To Raise His *Swain* Claim In State Court Does Not Bar That Claim As A Ground For Relief On Collateral Review Where It Was Fairly Presented To The State Court And Rejected On Its Merits.

Although Teague made no argument in state court that he was entitled to relief pursuant to *Swain* v. *Alabama*, the court of appeals is not correct that this argument is barred by procedural default pursuant to *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). *Teague*, 820 F.2d at 834 n.6. *Weathersby* v. *Morris* was cited to both the district court and the court of appeals as providing a basis to award Teague relief. Respondents did not assert in their response to this argument that a procedural default barred this claim. Their failure to raise this defense constitutes a waiver because the merits of Teague's claim are evident and the state court did review in the context of *Swain* the complaint that the prosecutor had made discriminatory use of the peremptory challenge. *Cf. Granberry* v. *Greer*, 481 U.S. ___, 107 S.Ct. 1671 (1987) (failure of the State to raise the defense of exhaustion of state remedies requires the court to determine whether the interests of comity and federalism would be better served by enforcement of exhaustion requirement).

Moreover, the state court rejected a *Swain* claim on its merits. Petitioner argued to the state appellate court that the prosecutor's proffered explanation for exercise of its challenges was not genuine because no basis existed to distinguish between the ten excluded black jurors and those jurors whom the prosecutor found acceptable except for race. (Appellant's Brief, pp. 80-82) The State argued *Swain* was the "definitive United States Supreme Court case in the area." (Appellee's Brief, p. 19) The appellate court acknowledged that "white jurors who fell within the men, women and age groups to which the State

referred were not excused peremptorily by the State" but rejected Teague's claim because he had failed to sustain his burden of proof pursuant to *Swain*, declining to adopt any representative cross-section requirement as placing too great a limitation on the peremptory challenge. *People* v. *Teague*, 108 Ill. App.3d 891, 439 N.E.2d 1066, 1069-1070 (1st Dist. 1982).

Although Teague did not argue that the state court should examine the record and determine whether an equal protection violation had been demonstrated pursuant to *Swain*, the state court resolved the issue as if he had. The state court found no basis for relief pursuant to *Swain*, overlooking Teague's failure to request that the record be evaluated in light of *Swain*. The state court having decided the issue on its merits despite the lack of preservation, a federal court may also reach the merits of the issue without a showing of cause for the procedural default and prejudice. *Ulster County Court* v. *Allen*, 442 U.S. 140, 149 (1979); *Thomas* v. *Blackburn*, 623 F.2d 383 (5th Cir. 1980).

The State urged the state court to judge Teague's claim on its merits in the context of *Swain*. The state court concurred, holding *Swain* dispositive. Other courts presented with an argument that a prosecutor exercised his peremptory challenges in an unconstitutional manner similarly resolved the issue, no matter in what form it was presented, by citing to *Swain* as the controlling authority. *See State* v. *Ucero*, 450 A.2d 809 (R.I. 1982); *Commonwealth* v. *Henderson*, 497 Pa. 23, 438 A.2d 951 (1981); *State* v. *Grady*, 93 Wis. 1, 286 N.W.2d 607 (Wis. App. 1979); *State* v. *Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981); *Gaines* v. *State*, 404 So. 2d 557 (Miss. 1981). These events suggest that the two claims, one based on the fair cross-section requirement and the other on the Equal

Protection Clause, when made in the context of a prosecutor's exclusion of a racial group from a jury, may be so factually and logically related that the raising of one affords the state court a fair opportunity to consider both. *Williams* v. *Holbrook*, 691 F.2d 3, 8 (1st Cir. 1982). The interrelationship evidenced by the responses of litigants and courts to complaints of a prosecutor's abuse of the peremptory challenge supports the conclusion that the presentation of the complaint on an alternative constitutional theory provides the state court with a sufficient opportunity to address the merits of the equal protection claim.

All that is required to provide a state court with a fair opportunity to apply constitutional principles and correct any constitutional error committed by the trial court is that the substance of the habeas claim be presented to the state court. It is not enough that all of the facts necessary to support the federal claim were before the state court, but is sufficient if the claim is presented in such a way as to fairly alert the state court to any applicable constitutional grounds for the claim. *U.S. ex rel. Sullivan* v. *Fairman*, 731 F.2d 450, 453 (7th Cir. 1984). Here the state court was presented with more than just the factual basis for the claim. The prosecution alerted the court to the equal protection theory and the court adopted that theory in reaching the claim and rejecting it on its merits. To allow the federal habeas court to utilize that same theory to award relief to Teague would imply no disrespect for the state court. *Ulster County Court*, 442 U.S. at 154. Teague's failure to himself urge the state court to disapprove the prosecutor's conduct as an equal protection violation creates no obstacle to this Court's resolution of the issue.

CONCLUSION

Wherefore, petitioner prays that the judgment of the court of appeals be reversed and the cause be remanded with directions that petitioner be released from custody or that a hearing be conducted to determine whether the prosecution made constitutionally permissible use of its peremptory challenges.

Respectfully submitted,

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